APPENDIX A

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

March 11, 1982

J. Portis Hicks, Esquire
Wender, Murase & White
400 Park Avenue
New York, New York

Dear Mr. Hicks:

In response to a request from one of the parties, we have retrieved and decontrolled an additional document relating to the issues raised in *Avigliano* v. *Sumitomo Shoji America, Inc.*, pending in the Supreme Court. With the approval of the Solicitor General, we are making this document available to all interested parties.

Sincerely,

/s/ JOHN R. CROOK

John R. Crook
Assistant Legal Adviser for
Economic and Business Affairs

Enclosure

[SEAL] *Department of State*

DECONTROLLED 3/9/82
by JOHN R. CROOK
L/EB JOHN R. CROOK

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TO AMEMBASSY TOKYO PRIORITY

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E.O. 12065 N/A

TAGS: ETRO, PGOV, EINV

SUBJECT: FOREIGN MINISTRY INTEREST IN DISCRIMINATION CASE, LISA M. AVIGLIANO, ET AL., AGAINST SUMITOMO SHOJI AMERICA, INC.

REF: (A) TOKYO 15234 (B) TOKYO 13800

1. FIRST SECRETARY NANAO OF JAPANESE EMBASSY REQUESTED APPOINTMENT WITH DEPARTMENT LEGAL OFFICERS AUGUST 16 TO RAISE SAME QUESTIONS POSED PARA 5 REF B. HIS REPORT BACK TO TOKYO SHOULD HAVE BEEN RECEIVED BY NOW, AND SHOULD HELP TO CLARIFY OUR VIEWS. DEPARTMENT WILL PROVIDE EMBASSY WITH MORE DETAILED TALKING POINTS ON THIS ISSUE AS SOON AS POSSIBLE.

2. DEPARTMENT REITERATED TO NANAO VIEW SET FORTH IN MARKS

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LETTER THAT FCN COVERS INVESTMENT THROUGH HOST COUNTRY—INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. DEPARTMENT OPINION IS BASED ON LANGUAGE OF TREATY ITSELF, WHICH CLEARLY SHOWS INTENT TO COVER SUCH SUBSIDIARIES (E.G., ARTICLE I(1) TREATY INVESTOR STATUS AND, MOST IMPORTANTLY, BROAD DEFINITION OF RIGHTS OF NATIONAL TREATMENT AND ESTABLISHMENT AT ARTICLE VII(1) WHICH AFFECTS INTERPRETATION OF OTHER ARTICLES, ALTHOUGH LANGUAGE OF EACH SPECIFIC PROVISION OF TREATY MUST BE EXAMINED SINCE DRAFTING AND INTENT DO VARY AND A FEW PROVISIONS EXCLUDE SUBSIDIARY COVERAGE.); ON DISTINCTION BETWEEN ISSUE OF TREATY COVERAGE OF SUCH SUBSIDIARIES (WHICH ON ITS FACE THE TREATY DOES) AND THAT OF THE NATIONALITY OF SUCH SUBSIDIARIES, AS DEFINED UNDER ARTICLE XXII(3) (THERE IS ABSOLUTELY NO CONTRADICTION BETWEEN TREATY COVERAGE AND RECOGNITION OF HOST COUNTRY NATIONALITY OF CORPORATIONS THEREIN INCORPORATED); AND ON POLICY GROUNDS, SINCE EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

3. DEPARTMENT SOMEWHAT SURPRISED THAT, ALTHOUGH NOT COMMITING ITSELF TO AN OPPOSING VIEW, FOREIGN MINISTRY SHOULD QUESTION THIS POINT, PARTICULARLY SINCE BOTH SUMITOMO AND ITOH HAVE ARGUED FOR TREATY COVERAGE. (FYI: ACCEPTANCE OF DEPARTMENT INTERPRETATION OF FCN SUBSIDIARY COVERAGE DOES NOT DECIDE OUTCOME OF CIVIL RIGHTS LITIGATION IN WHICH SUMITOMO AND ITOH FIND THEMSELVES. DEPARTMENT WILL POUCH MARKS LETTER TO EMBASSY; WE ARE WEIGHING TAKING FURTHER STEPS IN THIS LITIGATION TO CLARIFY OUR VIEWS END FYI). IN OUR EFFORTS TO REFINE OUR POSITION HERE WE WOULD WELCOME EMBASSY ASSISTANCE ON FOLLOWING:

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HAVE JAPANESE COURTS, GOJ EVER CONSTRUED FCN, OR SIMILAR BILATERAL TREATY, WITH RESPECT TO SUBSIDIARY COVERAGE? HOW DO OTHER FCN'S TO WHICH JAPAN IS A PARTY DEAL WITH THIS ISSUE? NOTE THAT JAPAN-EGYPT BILATERAL INVESTMENT TREATY (BIT) OF 1978 FOLLOWS EUROPEAN BIT MODELS WITH BROAD DEFINITION OF COVERED INVESTMENT, INCLUDING INVESTMENT ACCOMPLISHED THROUGH HOST COUNTRY SUBSIDIARIES, WHILE AT THE SAME TIME RECOGNIZING THAT NATIONALITY OF SUCH SUBSIDIARIES IS THAT OF COUNTRY OF INCORPORATION AND HQ. (ARTICLE I(1) AND (4)).

4. WE BELIEVE BROAD INTERPRETATION PARAGRAPH 2 SERVES BOTH US AND JAPANESE INTERESTS, AND IS CONSISTENT WITH GOJ POLICY AS REFLECTED IN BIT WITH EGYPT AND OECO PRACTICE. WE WOULD BE INTERESTED IN EMBASSY VIEWS ON ANY FACTORS WHICH MIGHT CAUSE GOJ TO FAVOR A NARROWER READING. VANCE

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John R. Crook
Assistant Legal Adviser for
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→ L/EB
Sumitomo
File

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L/EB J.R. Frost

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APPENDIX B

Chronology of State Department Release of Documents

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
10/17/78	State Dept. letter (Marks to EEOC) affirming right to invoke Article VIII(1) of Treaty by U.S. subsidiary	Sumitomo's motion to dismiss pending in United States District Court for the Southern District of N.Y.	App.—94a-97a
8/15/79	Various State Dept. file documents relating to FCN treaties (140 pages)	After District Court's 6/5/79 decision denying Sumitomo's motion to dismiss and after District Court had granted certification of issue for immediate appeal pursuant to 28 U.S.C. 1292(b).	App.—107a-306a
9/11/79	State Dept. letter (Atwood to EEOC) regarding right to invoke Article VIII(1) of Treaty by U.S. subsidiary, taking opposite position from Marks letter of 10/17/78	After Sumitomo's motion in the District Court for rehearing of 6/5/79 decision	App.—307a-308a
10/29/79	Various State Dept. file documents relating to FCN treaties (112 pages)	Same.	Not in record

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
9/26/80	9/9/80 document purporting to be letter of State Dep't supporting 9/11/79 Atwood letter.*	After filing of Sumitomo's brief on appeal in the United States Court of Appeals for Second Circuit.	App.—322a-324a
11/30/81 **	Various State Dept. file documents relating to FCN treaties (172 pages)	After certiorari had been granted by this Court.	Not in record, but certain documents submitted to the Court by counsel for respondents 2/25/82
12/18/81	Various State Dept. file documents relating to FCN treaties (53 pages)	Same.	Not in record
1/8/82	Legible copy of one of documents furnished to parties on 11/30/81	Same.	Not in record

* In its January 9, 1981 decision the Second Circuit rejected this document as improperly submitted by EEOC. 638 F.2d at 558 n.5, Pet. App. at 12a n.5.

** On October 1, 1980, Sumitomo made a comprehensive FOIA request to the State Department for documents relating to various FCN Treaties containing articles similar to Article VIII(1). There was no response to this request by the State Department until January 13, 1982, five days prior to the due date of Sumitomo's brief herein. On that date, and on January 15, 1982, the State Department's FOIA office released selected documents relating only to FCN treaties with Uruguay and Israel.

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
1/11/82	Various State Dept. file documents relating to FCN Treaties (over 1000 pages)	Same.	Not in record
1/13/82	Various State Dept. file documents relating to FCN Treaty with Uruguay*	Same.	Not in record
1/15/82	Various State Dept. file documents relating to FCN Treaty with Israel**	Same.	Not in record
1/27/82	Various State Dept. file documents relating to FCN treaties	After filing of Sumitomo's principal brief herein.	Not in record
3/11/82	Copy of State Dept. August, 1979 telegram to the U.S. Embassy, Tokyo, supporting Sumitomo's position in this litigation	After filing of all principal briefs herein.	Not in record, but included in Appendix A, *supra*.

* First set of documents released by State Department purporting to comply with 10/1/80 FOIA request made by Sumitomo.

** Second set of documents released by State Department purporting to comply with 10/1/80 FOIA request made by Sumitomo.